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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

REINALDO KAHN,

Plaintiff and Appellant,

v.

STEPHANIE HUMPHRIES et al.,

Defendants and Respondents.

D052889

(Super. Ct. No. GIS25016)

APPEAL from a judgment of the Superior Court of San Diego County, William S. Cannon, Judge. Reversed.

Plaintiff Reinaldo Kahn appeals a judgment entered in favor of defendants Stephanie Humphries and Cory Humphries (together Defendants) following the court's grant of their motion to dismiss the action because the court concluded Kahn did not have capacity to pursue the action. Kahn contends the court erred by granting the motion because suspension of the corporate assignor's rights to do business after transfer to an assignee of a "thing in action" does not deprive the assignee of the right to enforce the

assigned thing in action. He also contends his enforcement of the thing in action as the assignee does not prejudice the obligor of the assigned thing in action. We reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 12, 2006, New Frontier Trading Corporation (New Frontier), a California corporation, filed a fraudulent conveyance action against Defendants. Trial was scheduled for August 1, 2007. On or about July 2, 2007, the California Secretary of State suspended New Frontier's right to do business. As a suspended corporation, it lacked capacity to pursue the action and on July 30, 2007, Defendants filed a motion to dismiss the action. On August 7, 2007, Kahn filed a motion to allow his substitution as plaintiff and assignee of all rights of New Frontier in the action. Kahn's counsel submitted his declaration attesting to the assignment, Kahn's declaration regarding the assignment and a document entitled "Assignment." Section 3 of the Assignment gave Kahn "right title and interest in the judgment, pending litigation and underlying debt . . . identified as: New Frontier Trading Corporation v. Stephanie Humphries and Cory Humphries, Case #25016." The assignment was signed June 20, 2006. On August 31, 2007, acknowledging a valid assignment from New Frontier to Kahn, the court granted Kahn's motion to be substituted as plaintiff and continued the matter until November 6, 2007.

On the day of trial, Defendants renewed their motion to dismiss the action for lack of capacity of Kahn as assignee. Trial was continued until January 17, 2008, to allow oral argument on the motion. Defendants contend they received notice of the assignment after New Frontier's suspension by the Secretary of State and, under Code of Civil

Procedure¹ section 368, New Frontier's lack of capacity to pursue the action was an incapacity equally applicable to Kahn. On January 17, 2008, the court ruled Defendants were entitled to use New Frontier's lack of capacity to pursue the action as equally applicable to Kahn, and dismissed the action. Kahn appeals the court's ruling on the motion to dismiss.

STANDARD OF REVIEW

When an appeal raises a question of law, the appellate court applies de novo review, and gives no deference to the trial court's ruling. (*Diamond Benefits Life Ins. Co. v. Troll* (1998) 66 Cal.App.4th 1, 5.) A question of law is one that can be resolved by examination of relevant cases and statutes without considering conflicting evidence. (*Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 698, fn.3.) Even mixed questions of law and fact are reviewed de novo if the resolution primarily involves consideration of legal principles. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) Interpretation of a written instrument and of statutory law is an issue of law, (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.) and interpretation of section 368 is therefore conducted under de novo appellate review.

¹ All statutory references are to the Code of Civil Procedure unless otherwise specified.

DISCUSSION

Kahn challenges the trial court's ruling that lack of capacity because of the suspension of a corporate assignor after assignment of a "thing in action" applies to the assignee. As a collateral matter, he asserts that his ownership rights in the "thing in action" do not prejudice the obligor's right to assert set-offs and defenses under section 368 that exist at the time of or before notice of the assignment.

I

Kahn's Standing as the Real Party in Interest

We conclude the lack of capacity of the assignor after assignment of a "thing in action" does not deprive the assignee of capacity to sue on the assigned claim; the assignee is permitted to sue as the real party in interest. New Frontier's incapacity to proceed on its claims does not affect the assignee's ability to proceed on assignor's claim because Kahn as the assignee became the real party in interest. Kahn, as assignee of the claim, is the real party in interest and the action may be prosecuted by him. (§ 367; *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 224.) The real party in interest status of the assignee protects the obligor under the assigned claim against future conduct by the assignor of the claim and permits the obligor to assert available defenses against the real party in interest. (*Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, 351-352.)

Because the assignee becomes the real party in interest, the assignor cannot unilaterally defeat or impair the rights of the assignee without consent of the assignee. (*In re Marriage of Shore* (1977) 71 Cal.App.3d 290, 296.) The suspension of a

corporation subsequent to an assignment of its rights should not impair the rights of its assignee. (*Cleveland v. Gore Bros., Inc.* (1936) 14 Cal.App.2d 681, 683.) The suspension of New Frontier after it assigned the "thing in action" to Kahn should not affect the prosecution of his cause of action.

Suspension of the assignor does not deprive the assignee of standing. A corporation that lacks capacity to litigate is not equivalent to a corporation that lacks standing; the corporation's assignee maintains standing and a right to relief based on the cause of action. (*Friendly Village Community Assn. v. Silva & Hill Constr. Co., supra*, 31 Cal.App.3d at p. 224.) A corporation that lacks capacity to sue has a legal disability, similar to infancy or insanity, which deprives the corporation of the right to litigate in court. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351.) The disability may be cured and, in doing so, the corporation will regain capacity and the right to proceed in court.

Unlike lack of standing, however, lack of capacity is a plea in abatement. (*Parker v. Bowron, supra*, 40 Cal.2d at p. 351.) A plea in abatement deprives the party of its right to proceed in court while the legal disability exists but does not affect the underlying right to relief as it relates to the pleaded cause of action. Pleas in abatement based on a suspended corporation's lack of capacity to sue are not favored in law and are strictly construed. (*Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 370.)

As the assignee, Kahn maintains the right to litigate in court and obtain relief. The assignment carried with it all the rights of the assignor, including the right to sue under the cause of action assigned. (§ 368.5; *Foreman Roofing Inc. v. United Union of Roofers etc. Workers* (1983) 144 Cal.App.3d 99, 107.) At the time of the assignment, both parties

had capacity to litigate and therefore the assignment was valid. The legal disability that deprives New Frontier the right to pursue the action does not apply to Kahn as the assignee because the plea in abatement does not exist against him. He therefore retains capacity and standing to litigate the assigned cause of action as the real party in interest and was properly substituted as the plaintiff in this action.

II

Section 368

Section 368 provides that a thing in action assigned to the assignee is subject "to any set-off, or other defense existing at the time of, or before, notice of the assignment" is given to the obligor. (See also Civ. Code, § 1459.) The apparent purpose of the notice condition in section 368 is to permit continued dealings between the obligor and assignor until notice of the assignment is given to the obligor. Defendants, however, seek to apply the statute's protection as a right to retain lack of capacity as an affirmative defense. Although the assignee typically "stands in the shoes" of the assignor with regard to available set-offs and defenses, the California Uniform Commercial Code (Cal. U. Com. Code) recognizes the assignor might have more than one pair of shoes in which the assignee may stand. (See Cal. U. Com. Code, § 9404, subds. (a)-(b) [establishing a rule dividing defenses into two different tiers: defenses or claims arising under the contract assigned; and defenses or claims arising from other dealings between the obligor and the assignor.].)

It is, perhaps, more precise to say the assignee "stands in *some* of the shoes" of the assignor. If the obligor performs on a contract between it and assignor before notice of

assignment, the statute protects the obligor with a set-off reflective of performance. (Civ. Code, § 1459; 368; *Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 919.) Defendants, however, are not prejudiced by their inability to use lack of capacity as a defense because protections by set-off are different from defenses or claims arising from other dealings between the obligor and the assignor. (Cal. U. Com. Code, § 9404, subd. (a).) Lack of capacity is a plea in abatement that serves to defeat or suspend a pending action in a manner unrelated to the merits of the cause of action rather than to defeat the plaintiff's claim. (*Nevills v. Shortridge* (1905) 146 Cal. 277, 278.) The cause of action under a plea in abatement is open for reassertion or continuation after the grounds for the abatement have passed. (*Colvig v. RKO General, Inc.* (1965) 232 Cal.App.2d 56, 71.) For this reason, a plea in abatement has the effect of only postponing the action until the time a court considers the actual merits of the position of each party. The only exception to this rule arises when the plea serves a larger purpose than protection and benefit of the defendant. However, the statutory defense of lack of capacity that arises from a suspension is designed to cure the suspension or compel payment of taxes, and the defendant is merely an incidental beneficiary. (*Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 244.)

Here, Kahn as assignee does not stand in the shoes of the assignor with regard to a plea in abatement. The trial court's judgment in favor of Defendants served to suspend the pending action only until the defect was removed. After Kahn was established as the valid assignee and retained standing as the real party in interest to sue, grounds for the abatement no longer existed. Defendants cannot assert lack of capacity against Kahn;

therefore, the plea in abatement is not a transferable defense against Kahn and his claim against Defendants should proceed.

III

Equal Rights of the Assignee

Allowing the assignee to pursue the "thing in action," thereby disallowing the use of the assignor's lack of capacity against the assignee, does not give the assignee greater rights than those of the assignor. Unlike a set-off or defense relating to the underlying cause of action, a defendant's plea in abatement is not effective if not supported by facts *existing at the time* of the plea, even if facts actually did support the plea at some earlier time. (*Traub Co. v. Coffee Break Service, Inc.*, *supra*, 66 Cal.2d at p. 370.). New Frontier's lack of capacity to litigate was not a defense that existed against Kahn *at the time* Defendants asserted it against Kahn. Therefore, lack of capacity was not a defense against Kahn even though it previously was as to New Frontier. Kahn retains his right to pursue litigation against Defendants as the assignee of the claim.

DISPOSITION

The judgment is reversed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.